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Re-Use under US Copyright Law: Fair Use as a Best Practice or Just a Myth of Balance in Copyright?

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The Re-Use Practice

In copyright law, the term *Re-Use* describes the creation of new works by using, reconfiguring, rearranging, interpreting or otherwise borrowing elements of existing copyrighted works such as novels, films, pictures, songs or sound sequences (Klass 2016: 801). Therefore, *re-use* functions as a generic term for new media phenomena such as *fanfiction*, *appropriation art*, *mash-up*, *sampling* or *remix*, in which something new is created based on existing material (Klass 2017: 147 f.). With the increasing digitalisation and a higher degree of professionalisation, this reference culture attracted growing attention in the copyright discourse (Summerer 2015: 26). An illustrative example for this is *fanfiction* (Stieper 2015: 301; Knopp 2010: 28): the term *fanfiction* describes a creative writing process, in which fans inspired by popular books, shows, movies, comics, music, and games produce new stories such as prequels or sequels based on the original work, using its story, setting or characters.[1] The early days of this media phenomenon date back to the analogue era and have their origin *inter alia* in the US science fiction series *Star Trek*: based on the programmes and movies, fans wrote their own fictional stories and circulated them among themselves via letter (Tushnet 1997: 651 f.). In the era of digitalisation, the role of letters was superseded by the internet, and this kind of writing practice developed into a mass phenomenon on platforms such as www.fanfiction.net or www.archiveofourown.com.

While this creative practice became increasingly popular among fans, some of the original works' authors were not amused to see new creations based on their own. In the case of *Star Trek*, the authors' disapproval even led to a lawsuit caused by the fan film *Prelude to Axanar*. The film's producers for instance used the fictional language Klingon, created by *Marc Okrand* for *Star Trek*, and also adopted characters similar to the original ones. The original production company took the view that the unauthorised use was an infringement of their copyrights and filed a suit (*Paramount Pictures Corp. v. Axanar Productions, Inc.*, No. 2:15 CV 09938 (2017)).

This poses the question: is it legal to *re-use* an existing copyrighted work in order to create a new one? The answer constantly preoccupies creators of reference culture as well as authors, holders of rights and lawyers. It cannot be just a simple *Yes* or *No*, because this would not accommodate the various constellations within the individual reference cultures and the involved parties' many different interests. Therefore, the right question to ask is: which legal framework allows existing copyrighted material to be used lawfully for the creation of new works? Because of the country-of-origin principle (Klass 2007: 373 f.), which prevails in copyright law, this question cannot be answered globally, but only for individual jurisdictions. For this reason, I will focus on the US Copyright Act (US-CA) with its well-known *fair use* limitation in § 107 US-CA. After explaining when and how the *fair use* provision is applied in US copyright law, I will analyse if the *fair use* limitation is a best practice example worth adopting by other jurisdictions or if there is a need for legal reforms, for example based on the model of the Canadian Copyright Act.

Limitations on Copyright in US Law

New technological methods and the internet in particular have created a space, in which from a technical point of view nearly anything is possible and users have access to various copyrighted works far beyond the

territorial borders of their own countries. However, the extensive exclusive rights of the copyright owners stipulated in § 106 US-CA limit the users' possibilities to adapt and reproduce the original works. In the context of *re-use*, the exclusive right to create derivative works based on copyright-protected material, the right to copy it or to perform and display it publicly are of particular strategic importance. If a copyright-protected work is (re-)used by a third party without the right holder's authorisation, the (re-)use therefore constitutes fundamentally a copyright infringement in accordance with § 501 (a) US-CA.

In order to balance the resulting conflict of interests between the involved parties, limitations on the exclusive rights were introduced (Dreier 2004: 295, 298; Seemann 1995: 31, 63). One of these is the *fair use* doctrine, which allows third parties certain uses that are legally guaranteed to the copyright owners of the original material if the users comply with specific *fair use* provisions (Ballard 2006: 239, 240; Dnes 2013: 418, 424). In legal disputes, users can therefore defend themselves against the alleged copyright infringement by invoking the *fair use* limitation. In the following section, I will explain the statutory requirements the US legislator has laid down for the *fair use* provision.

The Fair Use Doctrine

In the context of copyright limitations, the most frequently discussed provision globally is the *fair use* doctrine. It is used widely, because it is highly flexible and advantageous for fan communities as it can also be applied to new media phenomena such as *fanfiction*, *sampling* or *collages*. Critics of the *fair use* doctrine denounce it as a source of legal uncertainty because of the four criteria that have to be considered when evaluating the fairness of using a copyrighted work. § 107 US-CA stipulates that the unauthorised use of a copyrighted work[2] is not a copyright infringement if the exploitation of the work can be qualified as fair. This judgement is made based on four factors specified in § 107 US-CA (the so-called *Four Factor Test*). These factors are (1) "*the purpose*

and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes", (2) *"the nature of the copyrighted work"*, (3) *"the amount and substantiality of the portion used in relation to the copyrighted work as a whole"*, and (4) *"the effect of the use upon the potential market for or value of the copyrighted work"*. According to the legal wording, these factors are only points of reference to be considered separately by the court on a case-by-case basis, before establishing an overall weighting indicating whether the act of the user is permitted by § 107 US-CA or not.[3] However, the law fails to provide a clear guidance on how the individual factors should be interpreted and how each should be weighted within the overall outcome (Nimmer 2017: 13–160). Historically, the task of interpreting and weighting the criteria was undertaken by the US courts as a part of the judges' freedom of decision (Nimmer 2003: 263, 281). The result is a settled case law for each of the four criteria, which I will explain below.

The Four Factor Test

The statutory factors were developed by the US jurisdiction, then codified by the legislator in § 107 US-CA and over the years continuously interpreted and refined by the courts in the following way.

The first factor[4], which is highly important for the judicial practice (Becker 2014: 133, 148), focuses on whether the use is primarily commercial or non-profit (Chik 2011: 242, 278 f.; Duhl 2004: 665, 682) and whether the new work is transformative (Leval 1990: 1105, 1111; Nimmer 2003: 263, 268). The non-commercial exploitation of a work is in principle acknowledged as a strong indicator of *fair use* by the judiciary, while not every commercial use is *per se* deemed unfair[5], but rather must be considered on a case-by-case basis as one of several factors that determining the outcome of the overall assessment.[6] In addition to the aspect of commercialism, the transformativeness of a work must also be taken into account when establishing fair use, particularly if the original work is used to create a new copyright-protected work (Nimmer

2003: 263, 268). A derivative work can be considered as transformative if the author has created something new, with a changed intention or a different character, and at the same time has modified the expression, meaning or message of the original work.[7] In this case, the original is just used as "raw material" (Leval 1989: 167, 170) that inspired the author of the derivative work to create something new.[8] This means, however, that transformativeness is an element that has to be established individually for each new work. Consequently, there is a risk of court decisions being highly subjective, as the judicial treatment of the cases depends essentially on the judges' individual understanding of transformativeness. New media phenomena may encounter less understanding than traditional forms of art (Lantagne 2015: 263, 300), which should not be underestimated in the case of *re-use*.

As a second factor, the nature of the original work has to be taken into account.[9] A fair use analysis has to consider whether the original work had already been published or not before being used[10], as unpublished works are legally subject to the exclusive right of the author to publish his or her work and therefore in need of greater protection. Consequently, the use of an unpublished work is more likely to be considered an unfair use.[11]

Settled case law also distinguishes between factual and fictional works. A *fair use* is considered more likely if the subject is primarily factual as, ultimately, the creativity of the original work is decisive for its copyright protection.[12] Conversely, this means that it is more difficult for users of primarily fictional works to invoke the *fair use* limitation.[13] Depending on the purpose of the use, the distinction between factual and fictional works may therefore not be expedient. Since the adoption of elements from an existing creative work is an intrinsic feature of the derivative work, the result of this practice is known from the outset. This applies in particular to *re-use* and is clearly apparent in fanfiction, in which the majority of the fan stories are based on fictional works (Tushnet 1997: 651, 676 f.). Therefore, in these cases, the fact that

primarily fictional elements have been adopted by users cannot automatically result in a denial of *fair use*.[14] As the distinction between factual and fictional works does not apply to all forms of use (Nimmer 2017: § 13.05 (A) (2) (a)), the second factor carries least weight within the overall evaluation of the four factors (Beebe 2008: 549, 584).

In applying the third factor, fair use is established by assessing the amount and substantiality of the copyrighted work used in relation to the entire original work, using both qualitative and quantitative aspects.[15] When assessing the quantity of extraction, the following principle is applied: the less the user takes from the original work, the more likely the new work is covered by the *fair use* limitation.[16] Where exactly the line is drawn, however, is ultimately dependent on each individual case, where the quality of the proportion used also plays an important role (Kleinemenke 2013: 106). While the proportion of the extracted elements may be quantitatively small in relation to the whole, the use may nevertheless be considered as inappropriate if the used part is the core or an essential part of the copyrighted original.[17]

As the fourth and most important factor (Nimmer 2003: 263, 267; Beebe 2008: 549, 584)[18], to guarantee the copyright owners of original works the fruits of their labour[19] and to give them an incentive to create new works[20], the courts decided that both the influence of the derivative works on the originals' existing and potential markets and the effect on their value have to be taken into account.[21] In assessing the damage on an original's existing and potential sales markets, the following principle applies: the higher the negative impact on the original work's markets, the less likely it is that the use is judged as fair.[22] Such a negative impact has been assumed in the past in cases where the derivative work targets the audience of the original work and the original's copyright owner loses revenues due to the substitute effect and the direct competition of the derivative work (Goldstein 2005: 10:58).[23] In the context of *re-use*, it is important to note that derivative works in particular may not necessarily compete with the original works and may also

be represented in different markets, so their sales are not affected by each other.[24] Under some circumstances, it is even possible that the *re-use* of original material in derivative works has a positive influence on the original work's market. In the case of *fanfiction* in particular, some argue that derivative works may impact positively on the sales of the original work, because the fan stories keep the interest in the original work alive (Tushnet 1997: 651, 672). This can also apply if the derivative works are distributed commercially, because a commercial use can be an indicator for a market loss of the original author, but is not a necessary consequence.[25] Commerciality *per se* is no indicator of whether the works are competing on the same market or the new work has a substitute character, particularly if the new work includes transformative elements.[26] However, even a non-commercial use cannot be classified categorically as a *fair use* (Neval 1990: 1105, 1124). For instance, it would be considered an unfair use if a commercial market for derivative works already existed, but rather than participating in it a non-commercial user offered the common audience a free alternative, ultimately resulting in a financial loss for the original author (Schuster 2014: 529, 533 f.; Lipton 2015: 425, 446 f.). A vivid example for this is *Amazon Kindle Worlds*, a commercial market for fanfiction. Amazon Publishing has secured licenses from production companies for popular works such as *Gossip Girl*, *Pretty Little Liars*, and *The Vampire Diaries*. Within these worlds, fans can legally create their own stories, which are offered to other fans in return for remuneration. Therefore, fanfiction writers who create stories based on these licensed worlds and publish them outside *Amazon Kindle Worlds* on other fanfiction platforms have an impact on the market for derivative works. This also disadvantages the copyright owners of the original works, who make a profit from these licensing deals (Johnson 2016: 1645, 1671 f.).

When assessing fair use according to the fourth factor, in addition to the market damage that has already occurred, the courts also need to examine whether an unrestricted exploitation could have a significant

adverse effect on a potential market of the original work in the future.[27] However, copyright holders of original works cannot exclusively secure all imaginable markets, but only those they would in principle pursue (Chung 2013: 367, 385).[28] The decisive factor is the potential relevance of a market rather than an existing intention to enter a specific market.[29] This applies in particular to the markets for works based on an original, transforming or supplementing it (Förster 2008: 68) such as quiz books[30] or lexicons[31].

Evaluation of the Fair Use Doctrine: Best Practice or Just A Myth?

While the legal wording and theoretical content of the *fair use* doctrine are positive steps towards encouraging free creativity, its practical application has many weaknesses and cannot provide the much-needed legal certainty for either original authors or users. The reason is that the legislative authorities drafted the factors as reference points and thus offered the courts a significant margin of discretion, which is often influenced by the subjective preferences of the individual judges (Nimmer 2003: 263, 281; Lantagne 2015: 263, 287). Neither has the legislator laid down any rules regarding the weighting of the four factors. Consequently, the courts take their decisions according to what they consider to be particularly worthwhile in a specific case (Nimmer 2003: 263, 281). The result is a large number of cases with individual outcomes which are neither transferable nor do they offer any direction for future proceedings (Agnetti: 2015: 115, 119; Jefferson 2010: 139, 141). It is therefore not surprising that the judiciary has called the *fair use* doctrine "*the most problematic in the whole history of copyright law*" (*Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (1939)). One reason is that, although the term *fair use* is widely known, only a minority actually realises its full legal meaning (Fiesler/Bruckman 2014). In particular, users' decisions are often guided by ethical ideas and social conventions, which rarely correspond to the legal norms (Fiesler/Bruckmann 2014). In addi-

tion, users often think the law is much stricter than is actually the case (Fiesler/Feuston/Bruckmann 2015).

Copyright owners take advantage of the uncertainty among users by employing the *fair use* limitation as a deterrent, contrary to its original purpose of promoting the progress of the arts (Agnetti 2015: 115, 131, 138). Although the *fair use* doctrine is supposed to be a user-friendly regulation, users are reluctant to rely on it and instead choose to sign license agreements with the rights holders of the original works to protect themselves (Agnetti 2015: 115, 131, 138). These precautions are driven by fear of provoking lengthy and cost-intensive lawsuits with an uncertain outcome (Agnetti 2015: 115, 131, 138). This conclusion is confirmed by an empirical study, which shows that, between 1976 and 2005, the number of court rulings in copyright cases is only in the lower three-digit range, whereas in the same period around 2,000 copyright claims were filed annually. Consequently, it can be assumed that in a large number of cases the parties reached an out-of-court settlement or the claim was withdrawn (Beebe 2008: 549, 565). The low number of court rulings ultimately shows that neither users nor copyright owners can reliably estimate their success. Adding to that is the fear of rising legal costs during long court proceedings. According to the rules of civil procedure, the court costs are calculated as a lump sum and are therefore independent of the amount in dispute (Böhmer 1990: 3049, 3050). Because of that, they are manageable and do not pose a significant financial disadvantage for the unsuccessful party (Neufang 2002: 34). This, however, does not generally apply to lawyers' fees (Schwartz 2011: 113, 116) which are often calculated on an hourly basis (Magratten 2010: 24) and can therefore quickly spiral. This is of particular relevance for the parties, because according to the so-called *American Rule* each party is responsible for all its legal costs irrespective of the outcome of the proceedings.[32] As a result, even the successful party has to bear its own legal fees, because an imposition of costs or a quota of the costs to the unsuccessful party is not provided by law (Magratten/Phillips/Connolly/Feldman/Mamysky

2010: 24; Poppick 1980: 165, 166). However, an exception is made for copyright disputes pursuant to § 505 US-CA, according to which a court has the power to order a party, even if successful, to pay the costs under certain circumstances.[33]

Despite its numerous weaknesses, the *fair use* doctrine has strength in its flexibility. The open formulation of the *fair use* provision enables the applicable law to include both current and future creative needs. Due to the dynamic changes in media practices within the Web 2.0, this aspect should not be underestimated. By opting for a general clause rather than a closed catalogue of individual limitations favoured by many European jurisdictions, the US legislator avoided the need to continuously reform copyright law by adding new individual limitations for the new forms of media use.[34] This is also the reason why other jurisdictions often adopt or at least consider the *fair use* doctrine as a model for their own copyright provisions (Band/Gerafi 2015). However, a high degree of uncertainty in a legal system is generally difficult to accept and, overall, weighs more heavily than flexibility, particularly because the uncertainty is counterproductive to the US legislator's aim of promoting the arts. For this reason, § 107 US-CA requires a reform with a view to the future law, moving from points of reference to precise criteria which clearly specify in which cases a use should be classified as fair in order to solve the problem of subjectivity in court decisions. This can be ensured by a provision that requires the cumulative fulfilment of the criteria prescribed by law.

In 2012, this path was chosen by the Canadian legislator[35] who passed an exception within the Canadian Copyright Act (CAC) for "non-commercial user-generated content" (Sec. 29.21 CAC) after its *fair dealing* exception met similar problems as the US *fair use* limitation.

The Canadian "YouTube Exception" as a Role Model for US Copyright Law?

Section 29 seq. of the Canadian Copyright Act regulates exceptions to copyright, which the judiciary refers to as "user's rights" (CCH Canadian Ltd. v. Law Society of Upper Canada (2004) 1 S.C.R. 339, 350). In this context, the *fair dealing* limitation, which was originally derived from the UK Copyright Act, is of particular importance (D'Agostino 2008: 309, 317; Gendreau 2012/2013: 673, 675 f.). Until the reform of the Canadian Copyright Act in 2012, a case of *fair dealing* was only presumed if the use of the copyrighted work served one of the exhaustively listed purposes (such as research, education, parody, criticism or news reporting) and additionally could be categorised as fair. The Canadian judiciary identified several criteria to determine whether the use fulfilled the fairness requirement.[36] These criteria were very similar to the four *fair use* factors and therefore faced similar challenges of legal uncertainty.[37]

Since the reform of the Canadian Copyright Act, the *fair dealing* limitation contains an additional exception for non-commercial user-generated content, the so-called "*YouTube Exception*".[38] This provision is no longer based on the vague notion of fairness and the related criteria used by the Canadian judiciary, but on objective facts which have to be fulfilled cumulatively (Kocatepe 2017: 400 f.). Thus, the use of a copyrighted work is not an infringement of copyright if user-generated content[39] such as a new copyright-protected work[40] is created by an individual[41] solely for non-commercial purposes[42] and classified with a copyright notice.[43] Furthermore, the use should not infringe the copyright of third persons[44] or have a substantial adverse effect on the existing or potential exploitation of the original work[45].

If these requirements are cumulatively fulfilled, users have the right to authorise even commercial intermediaries such as YouTube to use their work.

By taking into account the challenges posed by the dynamics of new media phenomena, the Canadian legislator has succeeded in creating

a new limitation which is not too rigid, because the term user-generated content was chosen that can include existing media practices as well as potential future ones (Kocatepe 2017: 400, 407). Although this was a step into the right direction, a need has already arisen for further legal reforms with regard to numerous undefined legal terms such as "non-commercial", "individual", "adverse" or "effect"[46]. These still need to be interpreted and clarified by the judiciary in order to avoid inconsistency and legal uncertainty (Kocatepe 2017: 400, 408). While the Canadian exception for non-commercial user-generated content is considered as user-friendly and thus will be interpreted rather broadly,[47] the criteria of the *YouTube Exception* still face a similar kind of legal uncertainty as the four factors of the *fair use* doctrine (Lantagne 2015: 263, 287; Förster 2008: 47). In addition, the legally permitted possibility to authorise intermediaries such as internet platforms to exploit user-generated content in a commercial way also neglects the interests of the original copyright owners, in particular their remuneration interests (Hayes/Jacobs 2013: 1,2). This shows that new remuneration models will have to be considered in the digital age in both the US and Canada.[48]

Despite the need for further legal reforms, the Canadian *YouTube Exception* grants authors and users far more legal certainty than the US *fair use* doctrine (Guzman 2015: 181, 192; Duggan/Ziegel/Girgis 2013: 442) due to a more precise formulation of factual requirements, in particular relating to new media phenomena. This is the determining factor when considering the Canadian reform as a possible model for modifications of the US Copyright Act.

Conclusion and Outlook

The problems arising with the application of the *fair use* factors on the typical characteristics of mass phenomena are as multi-faceted as the *re-use* practice itself. The open-ended general *fair use* clause has the advantage of including various creative processes, but this leads to a high degree of legal uncertainty that inhibits the creative practices of users

who were also pushed into licensing systems. The *fair use* limitation is not suited to achieve the much-needed balance in the conflict of interests between copyright owners and users. Quite the opposite is the case: intended as a limitation in favour of the users, in practice the usually financially better resourced rights holders reap the benefits, who often exploit legal uncertainty by concluding unnecessary license agreements with users and strengthening their bargaining position within the licensing negotiations. Ultimately, it can be concluded that the *fair use* limitation is not a best practice model.

The legal structure of the Canadian *YouTube Exception* is very close to a best practice model and ultimately preferable to a general *fair use* limitation. However, even within this regulation, there are several aspects in need of reform, in particular the vague legal terms and the lack of a remuneration obligation in favour of the original copyright owners. For this reason, this provision cannot be adopted verbatim by other jurisdictions. While the legislator can provide clarifications by introducing legal definitions or presumptive examples, it is important to point out that the more specific the legal terms are, the more the application scope of the norm narrows, which reduces its flexibility. Finding the right balance between flexibility and legal certainty is ultimately a tightrope walk and a challenge for the national legislator, which in case of doubt should favour flexibility. While overly narrow legal terms leave too little room for interpretation by the courts, they are able to interpret legally uncertain terms to achieve the intended balance between the interests of authors and users. For this reason, a legislative reform should not necessarily be the first choice, but at the same time expectations placed on the courts should not be too high. First, the legislator must lay a sufficient legal foundation, on which the courts can effectively interpret the provisions. If this cannot be realised, a legislative reform is inevitable—which applies in the case of the *fair use* doctrine.

Notes

1 For a detailed presentation of this media phenomenon see Reißmann/Klass/Hoffmann, POP. Kultur & Kritik 6 (1), 154ff. and Reißmann/Stock/Kaiser/Isenberg/Nieland, Media and Communication, 2017, 5(3), pp. 15ff. with further extensive references.

2 § 102 US-CA guarantees copyright protection for all types of original works.

3 Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 577f. (1994); Wright v. Warner Books, Inc., 953 F.2d 731, 740 (1991).

4 § 107: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes".

5 Another view is expressed by the courts in Sony v. Universal City Studios, 464 U.S. 417, Rn. 30ff. (1984) and Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

6 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994); Castle Rock Ent. v. Carol Publishing Group, 955 F. Supp. 260, 269 (1997); Robinson v. Random House, Inc., 877 F. Supp. 830, 840 (1995).

7 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569f. (1994).

8 Blanch v. Koons, 467 F.3d 244, 252 (2006).

9 § 107: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (...) (2) the nature of the copyrighted work".

10 Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985); Salinger v. Random House, 811 F.2d 90, 97 (1987); Wright v. Warner Books, Inc., 953 F.2d 731, 737 (1991).

11 Harper & Row v. Nation Enterprises, 471 U.S. 539, 553 (1985).

12 New Era Publications International v. Carol Publishing Group, 904 F.2d 152, 157 (1990).

13 Robinson v. Random House, Inc., 877 F. Supp. 830, 841 (1995).

14 Campbell v. Acuff-Rose Music, Inc. 510 U.S. 569, 586 (1994).

15 § 107: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (...) (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole".

16 Association of American Medical Colleges v. Mikaelian, 571 F. Supp 144, 153 (1983).

17 Harper & Row v. Nation Enterprises, 471 U.S. 539, 564f. (1985); Campbell v. Acuff-Rose Music, 510 U.S. 569, 587f. (1994).

18 Blanch v. Koons, 467 F.3d 244, 258 (2006); Twin Peaks Productions, Inc. v. Publications International, Ltd, 996 F.2d 1366, 1377 (1993); Harper & Row v. Nation Enterprises, 471 U.S. 539, 566 (1985).

19 Davis v. Gap, Inc. 246 F.3d 152, 175f. (2001).

20 Sony v. Universal City Studios, Inc. 464 U.S. 417, 429 (1984); Loren, 69 La. L. Rev. 1, 6 (2008); Schuster, 67 Oklahoma Law Review, 443, 448 (2015); Patry, Patry on Copyright, 09/2016, § 1:18; Mühlenbernd, in: Boesche/Füller/Wolf, Variationen im Recht, p. 248 (2006).

21 § 107: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include — (...) (4) the effect of the use upon the potential market for or value of the copyrighted work."

22 MCA Inc. v. Wilson (1981) 677 F.2d 180, 183; Meeropol v. Nizer, 560 F.2d 1061, 1070 (1977).

23 Wainwright Sec. Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 96 (1977).

24 New Era Publications International v. Carol Publishing Group, 904 F.2d 152, 159 f. (1990). This concerns in particular critical interpretation of the work as well as parodies, see Förster, Fair Use, pp. 69 f (2008).

25 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994). A different legal view was expressed by the court in the case Sony v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

26 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

27 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

28 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994).

29 Blanch v. Koons, 467 F.3d 244, 258 (2006).

30 Castle Rock Ent. v. Carol Publishing Group, 955 F. Supp. 260, 270 (1997).

31 Warner Bros. and J.K. Rowling v. RDR Books, 575 F. Supp. 2d 513 (2008).

32 Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975); Marx v. General Revenue Corp., 133 S.Ct. 1166, 1175 (2013).

33 § 505 US-CA: "In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs."

34 This development can be recognised from time to time, in particular in Europe, most recently within the framework of the codification of limitations for parodies, see also Mendis/Kretschmer, The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles. Project Report. Intellectual Property Office, 2013.

35 Copyright Modernization Act, SC 2012, c 20, which received Royal Assent on 29 June 2012 and came into force on 7 November 2012.

36 The factors which were set out in the case CCH Canadian Ltd. v. Law Society of Upper Canada (2004) 1 S.C.R. 339 and include the purpose of the dealing, the character of the dealing, the amount of the dealing, alternatives to the dealing, the nature of the work and the effect of the dealing on the work.

37 For a detailed comparison of the *fair use* limitation and the *fair dealing* ex-

ception see D'Agostino, 53 McGill L. J. 309 (2008); O'Heany, 12 Asper Rev. Int'l Bus. & Trade L. 75 (2012).

38 The term has its origin in the fact that the upload of a home video containing copyrighted material on the platform YouTube is viewed as paradigmatic for this exemption, see House of Commons Debates, 41st Parl, 1st Sess, no 51 (22.11.2011), 1714 (Elizabeth May).

39 See Schabas/Fischer/DiMatteo, MLRC Bulletin 2013 Issue 2 with further references; Katz, 12 Can. J. L. & Tech. 73, 98 (2014).

40 See Braithwaite, Osgoode Hall Law J. 20.2, 191, 195 (1982).

41 See Scassa, in: Geist, The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Copyright Law, University of Ottawa Press, pp. 431, 436 (2013); Chapdelaine, 26 I.P.J. 1, 10 (2013).

42 See Hayes/Jacobs, The Lawyers Weekly, Vol. 33, No. 28 (2013).

43 See Turnbull, 26 I.P.J. 217, 218 (2014).

44 See Katz, 12 Can. J. L. & Tech. 73, 100 (2014).

45 See Hayes/Jacobs, The Lawyers Weekly, Vol. 33, No. 28 (2013).

46 This applies in addition to the terms "user-generated content", "potential exploitation", "potential markets" and "substitute", see also McKeown, Fox on Canadian Law of Copyright and Industrial Design, 23:3.

47 Entertainment Software Association v. SOCAN, (2012) 2 R.C.S. 231; Rogers Communications Inc. v. SOCAN, (2012) 2 R.C.S. 283; Re:Sound v. Motion Picture Theatre Associations of Canada, (2012) 2 S.C.R. 376; SOCAN v. Bell Canada, (2012) 2 S.C.R. 326, 339; Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), (2012) 2 S.C.R. 345, 357.

48 Leistner, ZUM 2016, 580, 590ff. endorses an intermediate lump sum in favour of the copyright owners.

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